



In the Matter of:

DANIEL S. SOMERSON,

ARB CASE NO. 03-042

COMPLAINANT,

ALJ CASE NO. 03-STA-11

v.

DATE: December 16, 2003

**MAIL CONTRACTORS OF AMERICA,
FRIDAY, ELDREDGE, & CLARK, AND
OSCAR DAVIS, ESQ.**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondents:

Oscar E. Davis, Esq., *Friday, Eldridge & Clark, Little Rock, Arkansas*

ORDER DENYING COMPLAINANT'S MOTION TO VACATE

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A § 31105 (West 1997). The Complainant, Daniel Somerson, filed a complaint alleging that the Respondents, Mail Contractors of America (MCOA), the law firm of Friday, Eldredge & Clark (a law firm representing MCOA), and Oscar Davis (an attorney representing MCOA), violated the STAA by seeking a Protective Order and Witness Interview Restriction in a prior case, *Somerson v. Mail Contractors of America*, ALJ No. 2002-STA-44 (ALJ Dec. 16, 2002). On January 10, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order Dismissing Complaint and Referring Matter to the Tennessee Supreme Court's Board of Professional Responsibility (R. D. & O.). The ALJ found that "[t]he present complaint, asserting that the motion for protective order is an adverse employment action under the STAA, is completely specious" and "fails to allege the essential elements of a violation of the whistleblower protection provisions of the STAA." R. D. & O. at 2.

In a October 14, 2003 Final Order Striking the Complainant's Brief and Dismissing the Complaint, the Administrative Review Board struck Somerson's brief because the brief failed to comply with the Board's March 24th Order granting Somerson's second request for an enlargement of time and its February 13th Order denying Somerson's request to consolidate three appeals pending before the Board.¹ Nevertheless because, as provided in 29 C.F.R. § 1978.109(c)(1) (2003), the Board is required to "issue a final decision and order based on the record and the decision and order of the administrative law judge," the Board reviewed the record and the R. D. & O. to determine whether the R. D. & O. was supported by substantial evidence and was in accordance with law.

After reviewing the record and the facts in the light most favorable to Somerson, the Board agreed that Somerson had failed to rebut MCOA's motion to dismiss with any demonstration of a dispute in material fact and that he had failed to allege an essential element of his complaint, i.e., that the filing of a protective order constituted "discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment." Accordingly, the Board found that the ALJ's R. D. & O. was in accordance with law, and the Board dismissed Somerson's complaint. *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-011, slip op. at 7 (ARB Oct. 14, 2003).

On October 22, 2003, Somerson filed a motion to vacate the Board's decision.² Having reviewed Somerson's motion and finding no basis presented therein for vacating or otherwise modifying our decision, we **DENY** it in its entirety. Nevertheless we do find it necessary to correct a misstatement of the Board's holding included in Somerson's motion. Somerson states in the motion, "Mr. Somerson appreciates the Board striking ... Judge Burke's illegal ruling that only employers are covered by STA. The Board's Order reinforces that Mr. Davis and his law firm ... and those acting in concert with them may be found liable under STA for their actions directed against Mr. Somerson" To the contrary, the Board specifically, in no uncertain terms, did not hold that the ALJ's ruling was illegal or that Mr. Davis and his law firm may be held liable under the STA. Instead, in addressing the issue whether Mr. Davis or his law firm could be considered to be employers under the STAA, the Board clearly and most unambiguously stated, "[T]o

¹ In the March 24th Order granting Somerson's second request for enlargement, the Board notified Somerson that it would accept his brief if the Board received the brief on or before March 31, 2003. The Board, in its February 13th order, denied Somerson's request to consolidate three appeals pending before the Board because Somerson failed to specify any ground supporting consolidation.

² This motion was entitled in full, "Complainant's Motion to Vacate October 14, 2003 Order Striking Combined Omnibus Opening Brief in ARB Case Nos. 03-042 & 03-055, His Response to ARB Show Cause Order in ARB Case No. 03-068, His Renewed Motion for Consolidation, His Renewed Motion for Summary Reversal and Remand to a New ALJ to Hold Hearing on MCOA Gag Order Request and *Ex Parte* Contacts."

dispose of Somerson's complaint, we need not, and do not, decide here whether a 'person' as provided in 49 U.S.C.A. § 31105(a) must be an 'employer' as defined in 49 U.S.C.A. § 31101(3)(A)." Slip op. at 7.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge